

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



August 3, 2004

Agenda ID #3654

TO: PARTIES OF RECORD IN RULEMAKING 93-12-008

Enclosed is the draft decision of Administrative Law Judge Weismehl. The decision will not appear on the Commission's agenda for at least 30 days after the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the draft decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the draft decision as provided in Article 19 of the Commission's "Rules of Practice and Procedure." These rules are accessible on the Commission's website at <http://www.cpuc.ca.gov>. Pursuant to Rule 77.3 opening comments shall not exceed 15 pages. Finally, comments must be served separately on the ALJ and the assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail, or other expeditious method of service.

/s/ Angela K. Minkin
Angela K. Minkin, Chief
Administrative Law Judge

ANG: avs

Decision **DRAFT DECISION OF ALJ WEISMEHL** (Mailed 8/3/2004)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's own motion to provide rules and regulations governing the requirements for information on contents, inspection, operation, and training for the transportation of hazardous materials by rail within California.

Rulemaking 93-12-008
(Filed December 17, 1993)

O P I N I O N

This matter was initiated a number of years ago. No activity has directly occurred in this docket for several years.

A ruling was sent to the parties requesting responses to questions regarding whether there was a need for the proceeding to remain open and, if so, what the basis for that need was and what else remained to be done.

The Union Pacific Railroad Company and The Burlington Northern and Santa Fe Railway Company (Railroads) jointly filed comments. No other party filed comments in response to that ruling. The Railroads indicated that this docket should be closed.

While no party has requested that this matter remain open, on June 29, 2004, the staff of the Rail Operations Safety Section of the Consumer Protection and Safety Division (Staff) filed a motion "to enter ruling in this proceeding regarding the constitutionality of Article 7.5 of the California Public Utilities Code concerning hazardous materials transportation by rail." The body of the motion elaborates, requesting that the Commission issue an order

essentially confirming the results of two orders of the Federal District Court that addressed the constitutionality of certain provisions of the Public Utilities Code.

The first order, on plaintiff railroads' motion for summary judgment, found that §§ 7672(b) and (c) and 7673(c) of Article 7.5 of the Public Utilities Code were preempted by the Hazardous Materials Transportation Act (HMTA), 49 U.S.C. §§ 5101 et seq. Article 7.5 of the Public Utilities Code, entitled Hazardous Materials Transportation by Rail, had been enacted by the California Legislature following a catastrophic rail derailment and related release of metam sodium into the Sacramento River in July 1991. As noted by the Federal District Court, a major purpose of the HMTA was "the development of a uniform national scheme of regulation regarding the transportation of hazardous materials."

Order Granting Plaintiff's Motion for Summary Judgment at 4 (N.D.C.A., Case No. C-97-03660 THE, June 18, 1998.) The court also stated that:

"The HMTA contains an express preemption provision, which states that state laws are preempted if (1) compliance with both state and federal requirements is not possible, or (2) the state requirement is an obstacle to accomplishing federal regulatory goals. 49 U.S.C. § 5125(a). It also contains a provision that provides for preemption of any state regulations that are not 'substantively the same as' federal law in five enumerated subject areas. 49 U.S.C. §(b)(1)(A)-(E). 'For purposes of this section, "substantively the same" means that the non-Federal requirement conforms in every significant respect to the Federal requirements. Editorial and similar de minimus changes are permitted.' (*Id.* at 4-5.) There is nothing else that requires this docket remain open. Therefore, we will close it.

The court held that to the extent the state's list of chemicals for which disclosure was required differed from the HMTA list, it was not substantively the same and, therefore, was preempted by the HMTA. The court said: "The

materials designated as hazardous materials under California Public Utilities Code subsections 7672(b) and (c) differ substantively from the federal designations. Accordingly, the Court finds these subsections preempted by the HMTA. (*Id.* at 8.) The Commission filed a motion for reconsideration and in a subsequent decision the Federal District Court modified its earlier decision to find that Calif. Pub. Util. Code § 7672.5, which addresses verbal reports to local emergency responders, was not preempted. The court stated:

“Given all of the above, the Court concludes that the ‘notification and reporting’ subject area delineated in 49 U.S.C. §5125(b)(1)(D) does not include the subject area of providing immediate verbal reports to local entities so that emergency personnel can effectively respond to a release or other incident involving the transportation of hazardous materials. As such, the fact that the California requirements set forth in § 7672.5 are not ‘substantively the same’ as the federal requirements set forth in 49 U.S.C. §171.15 does not render them preempted by the HMTA...Accordingly the Court holds that Calif. Pub. Util. Code § 7672.5 is not preempted by the HMTA. (*Order on Motion for Reconsideration* at 8-9, (N.D.C.A, Case No. C-97-03660 THE, December 14, 1998.))

Staff has asked for a ruling in this proceeding consistent with the Federal District Court’s determinations as to the preemption or enforceability of these code sections. Such a ruling will, in effect, merely be a recitation of what has been determined by the federal district court. While this Commission can neither disapprove nor alter in any fashion these final determinations, we can, however, acknowledge them as precluding (in the case of § 7672(b) and (c) and 7673(c)) and upholding (in the case of § 7672.5) our ability to enforce these statutes. Section 3.5 of Article 3 of the California Constitution constrains an administrative agency, including one created by the Constitution or an initiative, from declaring

a state statute unenforceable or refusing to enforce it, except under very limited circumstances. Specifically it states, with respect to the impact of federal preemption:

Sec. 3.5. An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

...

(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

An appeal was taken of our decision to the Federal District Court and a determination made as to the conflict of specific code sections with applicable federal law, as noted above. The Federal District Court determinations became final, although other matters involved in related litigation were addressed on appeal to the United States Court of Appeals for the 9th Circuit. (*See Union Pacific Railroad Co. v. CPUC*, 346 F. 3d 851 (9th Cir. 2003), cert. Denied, 124 S.Ct. 1040 (2004)). Therefore, pursuant to Section 3.5 of Article 3 of the California Constitution, Calif. Pub. Util. Code §§ 7672(b) and (c) and 7673(c) are determined to be unenforceable. Calif. Pub. Util. Code § 7672.5 has been determined to not be in conflict with federal law.

Assignment of Proceeding

Susan P. Kennedy is the Assigned Commissioner and Philip Weismehl is the assigned Administrative Law Judge (ALJ) in this proceeding.

Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice

and Procedure. Comments were filed on _____, and reply comments were filed on _____.

Findings of Fact

1. California Pub. Util. Code §§ 7672(b) and (c), 7673 (c) and 7672.5 were challenged in federal court as being preempted by federal law.
2. This docket has been inactive for several years and there is no further activity anticipated.

Conclusions of Law

1. California Public Utilities Code §§ 7672(b) and (c) and 7673(c) have been determined by the federal courts to be preempted by federal law and are therefore unenforceable pursuant to Section 3.5 of Article 3 of the California Constitution.
2. California Public Utilities Code § 7672.5 has been determined by the federal courts to not be preempted or otherwise in conflict with federal law.
3. This docket should be closed.

O R D E R

IT IS ORDERED that this Rulemaking 93-12-008 is closed.

This order is effective today.

Dated _____, at San Francisco, California.